GOLDQUEST INTERNATIONAL LTD

v.

TEH LEONG KIAT

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-(S9)-23-07-2001]
20 FEBRUARY 2003

CIVIL PROCEDURE: *Costs - Security for costs - Principles and considerations - Foreign plaintiff - Evidence or risk of plaintiff having no assets - Amount of security - Whether at absolute discretion of court - Rules of the High Court 1980, O. 23 r. 1*

This was the defendant's appeal to the judge-in-chambers from the decision of the senior assistant registrar dismissing his application for security for costs (RM200,000) in an action for slander brought by the plaintiff (foreign company) against him. It was the plaintiff's case that the defendant had maliciously spoken and published words that were false against it. The defendant pleaded justification and also contended that he had uttered those words in honesty and good faith.

Held:

[1a] The defendant had reasonably shown that the plaintiff would be unable to pay the defendant's costs in the event that the plaintiff was unsuccessful in prosecuting its defamation action. The plaintiff was a foreign company and there was also a risk that it had no assets or that, if it had assets as it claimed, it would be difficult for the defendant to reach those assets. (pp 414 e-f, 415 f-g, 416 a-h, 417 a-h, 418 a-h, 419 a-h, 420 a-h & 421 a-e)

[1b] Contrary to the plaintiff's assertions, there was no necessity for the defendant to prepare a skeleton bill of costs in support of its application for security for costs. What was pertinent was that the defendant's application was supported by credible testimony and sufficient material to enable the court to decide on the amount of security to be ordered. The amount of security should be as the court thinks in all the circumstances of the case is just. (pp 414 e-f, 415 f-g, 416 a-h, 417 a-h, 418 a-h, 419 a-h, 420 a-h & 421 a-e)

[Defendant's appeal allowed.]

Case(s) referred to:

Aeronave SPA & Anor v. Westland Charters Ltd & Ors [1971] 3 All ER 531 ***(foll)***

Amalgamated Mining Services Pty Ltd v. Warman International Ltd [1988] 19 FCR 324 ***(refd)***

Berkeley Administration Inc v. McClelland [1990] 2 QB 407 ***(refd)***

Buckley v. Bennell Design and Constructions Pty Ltd [1974] 1 ACLR 301 ***(refd)***

Crozat v. Brogden [1894] 2 QB 30 ***(foll)***

De Bry v. Fitzgerald [1990] 1 All ER 560 ***(refd)***

Gardner v. Jay [1885] 29 Ch D 50 ***(refd)***

Health and Life Care Ltd (receivers and managers appointed) v. Price Waterhouse [1993] 11 ACSR 326 ***(refd)***

J & M O'Brien Enterprises Pty Ltd v. Shell Co of Australia Ltd [1983] 70 FLR 261 ***(refd)***

Jeffcott Holdings Ltd (in liq) v. Paior [1994] 14 ACSR 239 ***(refd)***

Lynnebry Pty Ltd v. Farquhar Enterprises Pty Ltd [1977] 3 ACLR 133 ***(refd)***

MA Productions Pty Ltd v. Austarama Television Pty Ltd [1982] 7 ACLR 97 ***(refd)***

New Fenix Compagnie Anonyme D'Assurances de Madrid v. General Accident, Fire and Assurance Corp Ltd [1911] 2 KB 619 ***(refd)***

Pacific Acceptance Corp Ltd v. Forsyth (No 2) [1967] 2 NSWR 402 ***(refd)***

Plaza Print Pty Ltd v. South British Insurance Co Ltd [1984] 54 ACTR 3 ***(refd)***

Procon (Great Britain) Ltd v. Provincial Building Co Ltd & Anor [1984] 1 WLR 557 ***(foll)***

Raju Rajaram Pillai v. MMC Power Sdn Bhd & Anor [2000] 4 CLJ 189 HC ***(refd)***

Re Barber Burgess v. Vinnicome (No 2) [1886] 55 LJ 624 ***(refd)***

Re Percy Mining Co [1876] 2 Ch D 531 ***(refd)***

Re Travelodge Australia Ltd [1978] 21 ACTR 17 ***(refd)***

Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 1 QB 609 ***(refd)***

Southern Cross Exploration NL v. Fire & All Risks Insurance Co Ltd [1985] 1 NSWLR 114 ***(refd)***

Spiel v. Commodity Brokers Australia Pty Ltd [1983] 35 SASR 294 ***(refd)***

Sydmar Pty Ltd v. Statewise Developments Pty Ltd [1987] 73 ALR 289 ***(refd)***

Thunderdome Racetiming and Scoring Pty Ltd v. Dorian Industries Pty Ltd [1992] 36 FCR 297 ***(refd)***

Thune v. London Properties Ltd [1990] 1 ALL ER 972 ***(refd)***

Tradestock Pty Ltd v. TNT (management) Pty Ltd (No 1) [1977] 14 ALR 52 ***(refd)***

Visco v. Minter [1969] 2 All ER 714 ***(refd)***

Weily's Quarries v. Divine Shipping Pty Ltd [1994] 14 ACSR 186 ***(refd)***

Willey v. Synan [1935] 54 CLR 175 ***(refd)***

Legislation referred to:
Direct Selling Act 1993, s. 4(1)
Rules of the High Court 1980, O. 23 r. 1, O. 78 r. 3(1)

Other source(s) referred to:
Peter F Carter-Ruck & Richard Walker, *Carter-Ruck on Libel and Slander*, 3rd edn, p 86

For the plaintiff - Shamsul-Bahrain Ibrahim; M/s Skrine
For the defendant - Alan M Rozario; M/s Rajadevan & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an appeal to the judge in chambers as seen in encl. 17 against the decision of the learned senior assistant registrar ("SAR") who dismissed the defendant's application in encl. 7 for security for costs against the plaintiff. It is said, and it is the general rule, that an order for security for costs will not be ordered against the defendant (*Visco v. Minter* [1969] 2 All ER 714, [1969] 3 WLR 70; *Willey v. Synan* [1935] 54 CLR 175; *Re Travelodge Australia Ltd* [1978] 21 ACTR 17; *Re Percy Mining Co* [1876] 2 Ch D 531 at 532; *Re Barber Burgess v. Vinnicome (No 2)* [1886] 55 LJ Ch 624; *Amalgamated Mining Services Pty Ltd v. Warman International Ltd* [1988] 19 FCR 324, 88 ALR 63; *New Fenix Compagnie Anonyme D'Assurances de Madrid v. General Accident, Fire and Assurance Corp Ltd* [1911] 2 KB 619; *Buckley v. Bennell Design and Constructions Pty Ltd* [1974] 1 ACLR 301 at 307; *Weily's Quarries v. Divine Shipping Pty Ltd* [1994] 14 ACSR 186, SC (TAS) and *Thunderdome Racetiming and Scoring Pty Ltd v. Dorian Industries Pty Ltd* [1992] 36 FCR 297, 109 ALR 196). Here, in the context of the appeal in encl. 17, it was the defendant who applied for security for costs against the plaintiff and he failed in his application before the SAR. It is entirely within the domain and the discretion of the court to order security by taking into account all the circumstances of the particular case in order to achieve a balance between ensuring that protection is afforded to the defendant and at the same time to avoid injustice to the plaintiff by unnecessarily shutting the plaintiff out or stultifying the plaintiff in the conduct of its litigation (*Jeffcott Holdings Ltd (in liq) v. Paior* [1994] 14 ACSR 239, SC (SA); *Health and Life Care Ltd (receivers and managers appointed) v. Price Waterhouse* [1993] 11 ACSR 326, 11 ACLC 1, 110 SC (SA); *Sydmar Pty Ltd v.*

Statewise Developments Pty Ltd [1987] 73 ALR 289, 11 ACLR 616, 5 ACLC 480; *MA Productions Pty Ltd v. Austarama Television Pty Ltd* [1982] 7 ACLR 97, 1 ACLC 404; *Spiel v. Commodity Brokers Australia Pty Ltd (in liq)* [1983] 35 SASR 294, 8 ACLR 410; *Buckley v. Bennell Design and Constructions Pty Ltd* [1974] 1 ACLR 301 at 305; *Lynnebry Pty Ltd v. Farquhar Enterprises Pty Ltd* [1977] 3 ACLR 133; *Tradestock Pty Ltd v. TNT (Management) Pty Ltd (No. 1)* [1977] 14 ALR 52; 30 FLR 343; *J&M O'Brien Enterprises Pty Ltd v. Shell Co of Australia Ltd* [1983] 70 FLR 261, 7 ACLR 790, 1 ACLC 924; *Southern Cross Exploration NL v. Fire & All Risks Insurance Co Ltd* [1985] 1 NSWLR 114; and *Tradestock Pty Ltd v. TNT (Management) Pty Ltd (No. 1)* [1977] 14 ALR 52 at 56, 30 FLR 343). It is an unfettered discretion on the part of the court to order security for costs as envisaged in the case of *Plaza Print Pty Ltd v. South British Insurance Co Ltd* [1984] 54 ACTR 3, 8 ACLR 797.

Facts Of The Case And The Law Thereto

The plaintiff – Goldquest International Ltd, is described as a multi-national company carrying on business as retailers of gold products and is incorporated in Hong Kong with its head office at "The Legal Affairs Department, 5th Floor, Mass Mutual Tower, 38 Glouchester Road, Wancha Hong Kong". Thus, the plaintiff is said to be resident outside the scheduled territories as defined under the Exchange Control Act 1953. The defendant, on the other hand, is an individual and was an independent tracking centre owner of the plaintiff on a commission basis to promote the plaintiff's business as retailers in gold products, and the promotion that was, carried out by the defendant was done through gatherings at his house at Lot 574, Lorong Udara Nyaman, Country Heights, 43000 Kajang, Selangor. But on 24 August 2000 it was said that the gathering at the defendant's house was of a different kind. On that day, the defendant orchestrated the gathering in order to launch a concerted attack on the plaintiff. It was said that at that gathering, the defendant falsely and maliciously spoke and published to and/or in the presence and hearing of all persons present there about the plaintiff and the plaintiff's method of conducting its business. This was what the defendant was purported to have said at that fateful gathering:

> Six months down the road, GoldQuest cannot survive anymore, so where is your future.
>
> Go and get your refund from GoldQuest now.
>
> I can definitely tell you that GoldQuest will die in Malaysia and Thailand.
>
> I don't care, 10 years from now, I will go after them.

They can never come back to Malaysia because there are warrants of arrests against Vijay and Joe.

They spent money lavishly and this is customers' moneys.

They face problems in all the countries they operate.

I will fight them forever, I don't care.

It was the stand of the plaintiff that those words uttered by the defendant were false. The plaintiff gave the particulars of the falsity along the following lines:

(a) that the plaintiff is not only solvent but financially strong in Malaysia and Thailand;

(b) that the customers' moneys are kept in the customers' accounts in the bank;

(c) that there has never been lavish spending on the company's account; and

(d) that the plaintiff had never experienced problems with the authorities in the countries where the plaintiff operates and neither had the plaintiff face problems with the owners of the independent tracking centres except with the present defendant.

It was also the stand of the plaintiff that the defendant spoke and published those words maliciously. The plaintiff then proceeded to itemise the particulars of malice on the defendant's part in these words:

(1) that the defendant's demands for more and more shares and profit in the tracking centres were not met;

(2) that the defendant detested and loathed being reminded:

(a) of his natural responsibility;

(b) to always preserve the exemplary image and creditability of the plaintiff in all his dealings with others pursuant to his contract with the plaintiff;

(c) to provide receipts for all his expenses;

(d) that the plaintiff was not able to produce receipts for his past claims; and

(e) to affirm past experiences by way of affidavits.

The plaintiff too was of the view that the words uttered by the defendant at the gathering meant and was understood to mean in their natural and ordinary meaning that:

(1) the plaintiff will become insolvent within six (6) months and any dealings with the plaintiff should cease immediately;

(2) the plaintiff is to cease business soon and that there is nothing to look forward to;

(3) the plaintiff is insolvent and that all the funds should be withdrawn;

(4) the plaintiff will be disbanded both in Malaysia and in Thailand;

(5) wherever the plaintiff remains in business, the defendant will seek to destroy it;

(6) the plaintiff has misappropriated funds belonging to its customers;

(7) in every country where the plaintiff does its business it runs counter to the authorities; and

(8) the plaintiff is a perpetual enemy.

By way of a reiteration, the plaintiff said that what the defendant meant when he uttered those words at the gathering was that in no time the plaintiff will go into liquidation and that in that situation the plaintiff offered gloomy prospects or not at all to its customers. That customers were strongly advised to withdraw their funds from the plaintiff immediately before it was too late. That it was imminent that the plaintiff will run away from this part of the world and that wherever the plaintiff would be located, the defendant would seek its whereabouts and destroy it. That the plaintiff was involved in illegal activities and that its officers have been issued with warrants of arrests. That the plaintiff was guilty of criminal breach of trust and had misappropriated funds belonging to its customers. In any country where the plaintiff operates its business, it would run foul of the authorities. That the defendant was determined to destroy the plaintiff.

The plaintiff then proceeded to give particulars pursuant to O. 78 r. 3(1) of the Rules of the High Court 1980 ("RHC") and that Order states as follows:

3 Obligation to give particulars

(1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he must give particulars of the facts and matters on which he relies in respect of such sense.

The particulars as itemised by the plaintiff were as follows:

(a) The words complained of were taped on Thursday 24 August 2000 between the hours of 1930 to 2030.

(b) The words were spoken and published to and in the presence and hearing of the officers attached to the plaintiff's company, namely, Nelson Win, Alvin Lee and Jeffrey Fong.

(c) That these facts and matters would have been known to a substantial and unquantifiable number of unidentifiable customers and prospective customers at the gathering and that these customers and prospective customers would have understood the words complained of to be as alluded to earlier.

It was said that the utterances and publication of the words as alluded to earlier were and constituted an act of sensationalism solely motivated by a desire to destroy the plaintiff and to live off the ruin of its trading character and the loss of the plaintiff's reputation. It was also said that not only was the defendant callous of conduct but he was also indifferent to promulgating injurious falsehood and oblivious to the fact that the words uttered were untrue and that those words were calculated to slander and disparage the plaintiff in its business. So it was said that by usage of those words and as a consequence thereof, the plaintiff had been gravely injured in its business reputation and trading character and that its directors have suffered considerable distress and embarrassment.

Further or in the alternative, the plaintiff in support of its claim for aggravated and/or exemplary damages relied on the following facts and matters:

(1) that the words complained of were uttered in a sensational manner; and

(2) that the defendant knew or must have known that the allegations were not true.

The plaintiff then asked this court to infer that the defendant uttered and published those words:

(a) with the knowledge that those words were slanderous and/or with reckless disregard as to whether or not they were slanderous; or

(b) after having established that the prospect of material advantage to the defendant by reason of those utterances and their publication far outweighed the prospect of material loss.

It was said that unless restrained by this Honourable Court, the defendant will continue to utter and/or publish the said or similar words defamatory of the plaintiff. For all these reasons, the plaintiff then proceeded to claim:

(1) against the defendant for damages, including compensatory damages, aggravated and exemplary damages;

(2) costs; and

(3) further or other relief.

All these averments are amply set out in the statement of claim.

The plaintiff's claim against the defendant is in the tort of defamation where the plaintiff alleged that the defendant had uttered defamatory words against the plaintiff. It is in the nature of a claim in damages for slander.

The defendant's defence is simply this. That the words uttered by the defendant was made in all honesty and in good faith. And the defendant too pleads the defence of justification. In para. 2 of the statement of defence, the averment goes like this:

> The defendant admits that on 24.08.00 in his house, he did say and/or publish the words mentioned in paragraph 2 of the plaintiff's statement of claim but denies that the words were false and uttered with malicious intent.

In regard to the plea of justification, it is ideal to refer to a textbook entitled *"Carter-Ruck on Libel and Slander"*, 3rd edn, by Peter F. Carter-Ruck and Richard Walker and there the learned authors at p. 86 have this to say:

> In order to succeed upon a plea of justification the onus lies upon the defendant to prove that the whole of the defamatory matter complained of, that is to say the words themselves and any reasonable inference to be drawn from them, are substantially true. 'When a plea of justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel' (*Digby v. Financial News Ltd* [1907] 1 KB 502, CA per Collins MR at 507). In every action for defamation the court starts with the presumption that the words

complained of are false until the contrary is established. Any statement which alters the character of the main imputation or adds to its sting must be justified. The precise charge must be proved (*Fysh v. Thorowgood* [1598] Cro Eliz 623). On the other hand for the defence to be successful it is not necessary that every 't' should be crossed and every 'i' dotted; it is sufficient if the substance of the libellous statement be justified. 'As much must be justified as meets the sting of the charge, and if anything be contained in the charge which does not add to its sting, that need not be justified' (*Belt v. Lawes* [1882] 51 LJQB 359).

Thus in *Edwards v. Bell* [1824] 1 Bing 403 the plaintiff, who was a Nonconformist minister at Marlow, complained of the following newspaper article:

> A serious misunderstanding has taken place amongst the independent Dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown out from the pulpit by the latter against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously.

Mr. Edwards brought a libel action against the editor of the newspaper, Mr. Bell, who pleaded by way of justification that the plaintiff had in fact abused his position in the pulpit by hurling abuse at the young lady in question. Mr. Bell did not attempt to substantiate the statement that differences had arisen as a result of this incident and that steps were to be taken in connection with it. It was held that the justification put forward was sufficient in that it met the sting of the charge and the gist of the libel, namely the attack on the young lady from the pulpit.

Writing a separate judgment for the Court of Appeal in the case of *Associated Leisure Ltd (Phonographic Equipment Co. Ltd) And Others v. Associated Newspapers Ltd (1968 P. No: 5769)* [1970] 2 QB 450, Lord Denning MR aptly said at p. 456 of the report:

> Lastly, Mr. Hirst relied on a decision by Devlin J. 16 years ago, in *Roth v. Odhams Press Ltd.* (unreported), December 20, 1954. It is not reported anywhere. It is not noted in any of the textbooks. But we were supplied with a transcript of his judgment. Some words were used by Devlin J. which can be read as meaning that if a defendant wishes to put in a plea of justification, but has not the evidence to warrant it, he ought to tell the plaintiff of his desire and apply for an extension of time before he puts it in a defence. Or, alternatively, that he ought to put a plea of justification on the record, with such particulars as he can muster, and then deliver further particulars afterwards. The defendant ought not to wait until he gets his evidence: for that would take the matter out of the control of the courts. Mr. Hirst described the case as 'novel'; and so it is. It was not known to the profession until it was brought to light in this case. I

do not think it warrants the wide interpretation which has been put upon it. I am sure Devlin J. did not wish in any way to detract from the rule, well settled, which I will read from *Gatley on Libel and Slander*, 6th ed. (1967), p. 462, para. 1046:

> A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages.

I have always understood such to be the duty of counsel. Like a charge of fraud, he must not put a plea of justification on the record unless he has clear and sufficient evidence to support it. The defendants in their case have observed that duty. In their affidavits the defendants say that, from the very beginning, they took the advice of counsel. When the defence was first delivered on January 14, 1969, counsel said: 'We cannot put it on now.' They then set to work making inquiries all over the world: in France and Italy, and especially in the United States of America. It was not until March of this year that counsel was able to say: 'Well, at last there is evidence on which I feel justified in placing a plea of justification on the record.' As soon as it was obtained, they applied for leave to amend. That was, I think, the proper course for counsel to adopt.

But when the defendant seeks to plead justification at a late stage, his conduct will be closely inquired into. The court will expect him to have shown due diligence in making his inquiries and investigations.

And his Lordship was of the view that justification, like fraud, should not be pleaded unless there is "clear and sufficient evidence to support it".

It is submitted that the slander consists of more than one specific charge and that it is in the nature of a general charge of misconduct. So, in such a situation, it is submitted that the defendant must set out the plea of specific instances of misconduct justifying such a description. It is also submitted that the defendant must plead with sufficient particularity in order to inform the plaintiff precisely what are the facts to be tried and what is the charge that is levelled against the plaintiff. For this submission, the plaintiff relied on the case of *J'anson v. Stuart* reported in the English Reports, volume XCIX, King's Bench Division XXVIII, 1 TR 749 at p. 1357. There, at p. 1357, it was reported as follows:

The defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons, with whom he had had dealings and transactions, wherefore he printed and published, &c.

To this plea there was a special demurrer, and the following causes were shewn; that the defendant hath not set forth or shewn in or by his plea in what manner the plaintiff was illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers; and also that the defendant hath not thereby shewn or disclosed any particular person or persons with whom the plaintiff was so illegally, fraudulently, and dishonestly concerned and connected; and also that the defendant has not shewn or disclosed any particular person or persons with whom the plaintiff hath been guilty of deceiving or defrauding, or in what manner, or in what particular dealings and transactions, he hath so deceived and defrauded any such person or persons; and also that the defendant hath not in or by his plea set forth any day or time when the said several facts alleged by him in that plea against the plaintiff or any of them happened; and also that the defendant has set forth the charges in that plea contained in so general and uncertain a manner, that the plaintiff cannot know what particular facts the defendant will attempt to establish by evidence on the trial of this cause in order to support those charges, and therefore cannot be prepared to disprove or answer the same.

Now, to say, as was said by the plaintiff, that the defendant did not state in his statement of defence about the particulars for the defence of justification would be to do an injustice to the defendant. In fact, and this is the reality of the matter, the defendant gave the particulars of "justification" and "honest belief" in his statement of defence and they are worded as such:

(a) that the plaintiff had been charged in the Magistrate's Court, Petaling Jaya under s. 4(1) of the Direct Selling Act 1993;

(b) that warrants of arrests have been issued by the Magistrate's Court, Petaling Jaya on 14 July 2000 against two of the plaintiff's directors, namely, Vijayeswaran a/l S. Vijayaratnam and Jose Salvador Sandejas Fabregas;

(c) that the said directors have bolted and have fled from Malaysia;

(d) that the members of the board of directors of the plaintiff's company are not Malaysian citizens; and that only Vijayeswaran a/l S. Vijayaratnam is a Malaysian citizen;

(e) that the plaintiff first started its business in Malaysia in 1998 and that it was the defendant who first started the plaintiff's business in Malaysia as a country-header;

(f) that the plaintiff promised to pay the defendant 40% commission from the selling price of the gold coin;

(g) that the defendant was not paid the commission that was promised by the plaintiff and that the plaintiff owe the defendant the sum of RM63,840,000;

(h) that the defendant had filed the writ against the plaintiff in the High Court of Malaya at Kuala Lumpur *vide* civil suit no: S9-22-686-00 on December 6, 2000 and that the defendant would refer to the writ and the statement of claim at the trial of the present action vide civil suit no: S5-(S9)-23-07-01;

(i) that before the defendant filed the writ vide civil suit no: S9-22-686-00, the defendant had through his solicitors Messrs Rajadevan & Associates wrote a letter to the plaintiff dated 15 November 2000 and demanded the commission money to the tune of RM63,840,000;

(j) that it was only upon receipt of the letter from the defendant's solicitors demanding payment of the commission that the plaintiff proceeded to instruct its solicitors Messrs Skrine to file the present action vide civil suit no: S5-(S9)-23-07-01; and

(k) that the plaintiff's directors had spent money lavishly by:

(i) travelling by air on a first class ticket; and

(ii) staying in a luxurious hotel.

The defendant also itemised the particulars of "good faith" in his statement of defence in these words:

(a) that it was the defendant who first started the plaintiff's business in Malaysia;

(b) that the defendant had marketed the gold coin in a big way in Malaysia;

(c) that many members, distributors and businessmen of the plaintiff's gold coin became members on the strength of the defendant's representations;

(d) that the defendant had warned the members, distributors and others about the affairs of the plaintiff's company so that they would not be manipulated; and

(e) that the defendant had placed more emphasis on the interests of the plaintiff's other distributors in Malaysia.

The defendant further denied all the allegations in paras. 7, 8 and 9 of the plaintiff's statement of claim – which have been set out earlier, and put the plaintiff to strict proof thereof. The defendant averred in his statement of defence that it was the plaintiff who owed him. The defendant then prayed in his statement of defence that the plaintiff's claim be dismissed with costs.

At this stage, it would be very difficult and indeed impossible to evaluate the chances of success of the plaintiff's case and for that matter the chances of success of the defendant's defence (*Raju Rajaram Pillai (t/a Dhanveer Enterprise) v. MMC Power Sdn Bhd & Anor* [2000] 4 CLJ 189). I should not, at this juncture, in deciding the issue of security for costs in the context of the appeal in encl. 17 proceed on the merits of the action. I am fortified in my view by a passage that appears in the judgment of Davey LJ in the Court of Appeal case of *Crozat v. Brogden* [1894] 2 QB 30 at 36 and there his Lordship had this to say:

> I only desire to add, with regard to the grounds stated by Mathew J, that in my opinion, the court cannot, upon an application for security for costs to be given by a plaintiff, go into the merits of the action. It appears to me that it would be highly inconvenient to do so, and as the reason for giving security for costs is not dependent on the merits of the action, I do not see why the merits of the action should be looked into at all. If the defendant has no defence, or if it is a frivolous defence, and a mere attempt to try the action over again, there are appropriate means for setting aside and removing from the files of the court a statement of defence which affords no real ground of defence, but which is frivolous and vexatious.

Then, there is also the passage emanating from the wet pen of Bowen LJ in the case of *Gardner v. Jay* [1885] 29 Ch D 50, where his Lordship wrote at p. 58 thereof:

> ... when a tribunal is invested by Act of Parliament or by rules with a discretion, without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the rules did not fetter the discretion of the judge why should the court do so.

This would be followed by an extract from the judgment of Lawton LJ in *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 1 QB 609, 629 and there his Lordship said:

> ... the court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straitjacket by considerations of burden of proof. It is a discretion which the court will exercise having regard to all the circumstances of the case.

I pause here to take stock of the situation. I must now revert back to the case of *Raju Rajaram Pillai (t/a Dhanveer Enterprise) v. MMC Power Sdn Bhd & Anor (supra)* and there at p. 201 of the report, I made reference to the RHC and I said:

> Generally, the court has the discretionary power to order security for costs. Rule 1, para (1) of the RHC states that the court may order security for costs 'if, having regard to all the circumstances of the case, the court thinks it just to do so'. In my considered view, these words meant a lot. It should be given its due recognition. These words have the desired effect of conferring upon the court a real discretion to consider the circumstances of each case and to determine whether and to what extent a plaintiff or the defendant, as the case may be, be ordered to provide security for costs. Thus, the court has the discretion:
>
> (i) to consider the circumstances of the case;
>
> (ii) and to decide whether to order security for costs; and
>
> (iii) to determine the quantum to be imposed for the security for costs.

Another authority worth mentioning would be that of *Aeronave SPA & Anor v. Westland Charters Ltd & Ors.* [1971] 3 All ER 531 and there Lord Denning MR in his judgment at p. 533 aptly stated:

> I agree … that the rule does give a discretion to the court. In 1894 in *Crozat v. Brogden* Lopes LJ said that there was an inflexible rule that if a foreigner sued he should give security for costs. But that is putting it too high. It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order … The ordinary rule still remains, that it is a matter of discretion.

In encl. 7, the defendant sought security for costs in the sum of RM200,000 payable by the plaintiff in cash to be deposited in court or in a sum as the court thinks fit and fair. In its original text, encl. 7 was worded in this way:

> a) Bahawa Plaintif membayar kepada Mahkamah Yang Mulia ini wang tunai berjumlah RM200,000.00 atau suatu jumlah yang dianggap sesuai dan adil oleh Mahkamah Yang Mulia ini sebagai Sekuriti untuk kos tindakan ini kepada Defendan disini dalam tempoh (07) tujuh hari dari tarikh perintah ini;
>
> b) Bahawa tindakan Plaintif disini dibatalkan jika Plaintif gagal membayar Sekuriti untuk kos tersebut dalam tempoh masa yang diperintahkan oleh Mahkamah Yang Mulia ini.
>
> c) Kos Permohonan ini adalah kos dalam kausa.
>
> d) Lain-lain relif yang dianggap berpatutan oleh Mahkamah Yang Mulia ini.

Enclosure 7 was supported by an affidavit in encl. 6 and that affidavit alluded to the writ and the statement of claim and it also annexed therein the statement of defence as exh. "TLK1". There was no "skeleton bill of costs" annexed to the affidavit in encl. 6 and the learned counsel for the plaintiff submitted that the quantum of RM200,000 as suggested and adverted to in encl. 7 was not only illusory, it was also said to be oppressive. The learned counsel for the plaintiff then referred to the case of *Procon (Great Britain) Ltd. v. Provincial Building Co. Ltd. & Another* [1984] 1 WLR 557, a decision of the Court of Appeal with the coram of Cumming-Bruce, Griffiths and Stephen Brown LJJ; and the learned counsel for the plaintiff then referred me to the UK Supreme Court Practice 1982 that was alluded to in the judgment of Cumming-Bruce LJ, in that case, and where his Lordship said at p. 562 to p. 563 of the report:

> Mr. Irvine submits the practice in the Queen's Bench Division is settled and is accurately summarised in a note in the Supreme Court Practice 1982 under R.S.C., Ord. 23, r. 1, at p. 440. That note reads:
>
> > Amount of security. The amount of security awarded is in the discretion of the court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not the practice to order security on a full indemnity basis. The more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up to the stage of the proceedings for which security is ordered; but there is no hard-and-fast rule. It

> is a great convenience to the court to be informed what are the estimated costs, and for this purpose a skeleton bill of costs usually affords a ready guide (cited with approval by Geoffrey Lane J. in *T. Sloyan & Sons (Builders) Ltd. v. Brothers of Christian Instruction* [1974] 3 All E.R. 715, 720).

Mr. Irvine submits that that note is accurate and that the effect that should be given to it – which, he submits, is the effect which is given by judges of the Queen's Bench Division – is as follows. Unless there is some unusual feature, the judge after ascertaining, as he must, the estimated party and party costs, up to the stage of the proceedings with which he is proposing to deal, must deduct an arbitrary fraction of one third of those costs so that the party who has proved those costs will have to bear them himself without security; and if the plaintiff – in this case the defendants – is a corporation outside the jurisdiction who is in liquidation with negligible net assets (if any), the defendant to the counterclaim will have the privilege of this practice of fighting the counterclaim, paying the costs that are necessary and reasonable in order to meet the claim; but although he will obtain security in respect of two-thirds of those costs he will incur the other third of the costs, pay them, and, at the end of the day, if successful on the counterclaim have the privilege of obtaining nothing in respect of those costs from the unsuccessful counterclaimant. This is a privilege which the plaintiffs in this case do not wish to enjoy. And their reluctance to reconcile themselves to the two-thirds' rule of practice can be appreciated when one looks at the figures which the judge arrived at when trying to decide what costs had reasonably been incurred.

But Cumming-Bruce LJ, in that case, was not happy with the Supreme Court Practice 1982 and this was what his Lordship said at p. 566 to p. 567 of the report:

> I am satisfied that, having regard to the provisions of R.S.C. Ord. 23 r. 1(1), which on their face confer an unfettered discretion upon the court, there is no solid reason for a general and arbitrary practice whereby, after estimating party and party costs up to the date of the proceedings for which security is ordered, an arbitrary fraction of one-third is knocked off before the order for security is made. There is nothing, in my view, in the authorities that have been cited to this court to justify the validity of what the editors of The Supreme Court Practice 1982 describe as the more conventional approach of fixing the sum of two-thirds of the estimated party costs. On the contrary, in the cases which I have cited, the principle is this: the security should be such as the court thinks in all the circumstances of the case is just.

Continuing further, Cumming-Bruce LJ, in that case, had this to say at p. 567 of the report:

> Therefore, on the principles which in my view are to be derived from the language in the rule, and the words of Lord Lindley M.R. in *Dominion Brewery Ltd. v. Foster*, 77 LT 507, 508, there was no reason to think that it would be just to the plaintiffs to knock off an arbitrary fraction of party and party costs which the judge was satisfied had, as to most of them, already been incurred and paid, but as to others would necessarily be subject to an informed appreciation and estimate. Indeed, had the judge in the circumstances adhered to what was thought to be the conventional Queen's Bench Division approach, the result would have been wholly unjust. It would have meant that the plaintiffs, in order to meet the counterclaim, had or would incur 2 million pounds costs which they had no prospect of ever recovering from anybody. That cannot possibly be just.

And Cumming-Bruce LJ, in that case, gave this advice to the editors of the Supreme Court Practice 1982 as seen at p. 567 to p. 568 of the report:

> In my view, whatever the practice in the Commercial Court may be (as to which we have heard varying accounts from the Bar) as far as the position in this Queen's Bench Division action is concerned, the words of the rule point to the order made by the judge; and there was no occasion, having regard to all the circumstances, for making any fractional deduction whether one-third or otherwise. I take the view that the note under the heading 'Amount of security' which has been published in The Supreme Practice to the notes to R.S.C., Ord. 23 since 1964 is expressed in too dogmatic and inflexible terms and has probably given rise to a misunderstanding by masters and judges of the principles to be followed having regard to the words of the rule. In my view, I would respectfully suggest to the editors of The Supreme Court Practice 1982 that they reconsider the words of their note. As I have stated, where there is a prospect of settlement, that is a factor to be taken into account by the court in deciding the quantum of security to be ordered. But in a case such as the present, where millions of pounds of costs assessed on a party and party basis have become the subject of fee notes and have in most cases already been paid, there is no reason that I can see in justice or common sense for any conventional discount of the kind described in the note. There will, of course, be a discount as the judge made, having regard to his expectation that the fees which were particularised before him, would be reduced by the taxing master – that is, a quite different matter – but when that discount has been made, if the judge is satisfied that the solicitors have honestly attempted to make, and have made, an actual estimated calculation of their costs and disbursements, then, when the judge has arrived at what he thinks is the actual figure, he should order that figure to be the figure incorporated into his order for security.

> It is to be hoped that the editors of The Supreme Court Practice 1982 will decide not to advise practitioners of the existence of any conventional scale unless they are perfectly certain, on a scrutiny of the case law, that authoritative guidance has been given in the cases which explains the way in which the rule should be applied.
>
> For those reasons, on the first issue raised in the appeal, I hold that the appellant fails. I have dealt with the matter at some length because I regard it as a matter of some general importance.

Griffiths LJ writing a separate judgment in the same case also questioned the note in The Supreme Court Practice that had stood, according to his Lordship "unchallenged for 20 years" (see p. 570 at para. "G" of the report). And at p. 571 of the report, Griffiths LJ said:

> It is, of course, for the party seeking an order for security, to put before the court material that will enable the court to make an estimate of the costs of the litigation.

And Griffiths LJ rounded up the matter by saying, in that case, at p. 571 to p. 572 of the report:

> I agree for the reasons given by Cumming-Bruce LJ that it was a matter for the discretion of the judge to consider the particular figures, bringing to them a lifetime of experience in this field of work. I see no reason for interfering with his discretion and, for the reasons I have given, in my view he was fully entitled to award costs on what he described as an 'indemnity basis,' which was in fact on the basis of awarding costs equivalent to his best estimate of the taxed costs which had actually been incurred.
>
> I would only add that 6 million pounds may seem a very daunting figure, but it is in fact only approximately three per cent of the sum at stake in this vast litigation. I doubt if it would be considered an adequate basis for a contingency fee on the other side of the Atlantic.
>
> I agree for these reasons and those given by Cumming-Bruce LJ that this appeal should be dismissed.

Stephen Brown LJ in the same case recommended the removal of the Supreme Court Practice 1982 and this was what his Lordship said at p. 572 of the report:

> I agree that this appeal should be dismissed for the reasons given by Cumming-Bruce L.J. I also desire to associate myself with the observations of Griffiths L.J. upon the note in The Supreme Court Practice 1982. It is time that it was removed.

Thus, applying the case of *Procon (Great Britain) Ltd. v. Provincial Building Co. Ltd. And Another (supra)* as best as I can, I must say that:

(1) the UK Supreme Court Practice 1982 which recommended a "skeleton bill of costs" should be taken with a pinch of salt since Stephen Brown LJ had suggested its removal;

(2) it is the court that will ultimately fix the quantum for security for costs as the court thinks in all the circumstances of the case to be just; and

(3) it is for the defendant to put before the court sufficient material to enable the court to decide the quantum for the security for costs.

Concisely put, there is no necessity for the defendant to prepare the skeleton bill of costs in its affidavit in encl. 6. What is of pertinence would be this. That an application for security for costs must be supported by credible testimony and this is done in this appeal by the presence of the affidavit in encl. 6. It is part and parcel of my judgment that the affidavit in encl. 6 reasonably shows that the plaintiff will be unable to pay the costs of the defendant in the event the defendant is successful (*Weily's Quarries v. Devine Shipping Pty Ltd* [1994] 14 ACSR 186, SC (TAS); and *Pacific Acceptance Corp Ltd (t/as Flack & Flack) v. Forsyth (No 2)* [1967] 2 NSWR 402, [1967] 85 WN (Pt. 1) (NSW) 715). And the basis for making an order for security against the plaintiff is the risk that the plaintiff has no assets, or if there are assets as alleged by the plaintiff, it will be difficult for the defendant to reach those assets (*De Bry v. Fitzgerald* [1990] 1 All ER 560 at 565; *Berkeley Administration Inc. v. McClelland* [1990] 2 QB 407, [1990] 1 All ER 958 at 963, [1990] 2 WLR 1021; and *Thune v. London Properties Ltd* [1990] 1 All ER 972 at 980) bearing in mind that the plaintiff is a foreign company and is outside jurisdiction.

So the question is simply this. Is it just to order security for costs? I say, and it is my judgment, that it is just to order security for costs after having regard to all the circumstances of the case (O. 23 r. 1, para. (1) of the RHC) and I will now advance the reasons for doing so:

(a) the plaintiff, as I said, is a foreign company, with a registered office in the British Virgin Island and it has its headquarters in Hong Kong (see para. 5 of the defendant's affidavit in encl. 6);

(b) the plaintiff has stopped its business operations in Malaysia and it has no other offices in Malaysia (see para. 8 of the defendant's affidavit in encl. 6);

(c) there is only one director of the plaintiff who is a Malaysian citizen and he is Vijayeswaran a/l S. Vijayaratnam while the rest of the directors are foreigners (see para. 6 of the defendant's affidavit in encl. 6);

(d) there is a warrant of arrest issued against the plaintiff's Malaysian director by the name of Vijayeswaran a/l S. Vijayaratnam and that director has since vanished and he is believed to have fled the country (see para. 7 of the defendant's affidavit in encl. 6);

(e) the directors of the plaintiff's company have been charged under s. 6 of the Direct Selling Act 1993 (see para. 7 of the defendant's affidavit in encl. 6);

(f) that the defendant's defence of justification as alluded to in the affidavit in encl. 6 had not been denied or challenged by the plaintiff in its affidavit in reply as seen in encl. 15 – the affidavit in reply of Wilfred Royce Lane, a New Zealand citizen and residing at no: 5/F, Mass Tower, 38 Gloucester Road, Wanchai, Hong Kong; and

(g) there is no reciprocal enforcement between Malaysia and the British Virgin Island under the Reciprocal Enforcement of Judgments Act 1958 (Revised 1972) as alluded to in the First Schedule thereto and so it is correct to say as was said by the defendant that in the event the defendant were to succeed in his defence, the defendant may not be able to recover from the plaintiff not only the costs of the present action *vide* civil suit no: S5-(S9)-23-07-01 but, perhaps also the commission to the tune of RM63,840,000 which the plaintiff promised the defendant.

Conclusion

For the reasons adumbrated above, I allowed the appeal in encl. 17 with costs.